

United States Courts
Southern District of Texas
ENTERED

Michael N. Milby, Clerk of Court

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<sup>1</sup>This motion was referred to this magistrate judge for determination pursuant to 28 U.S.C. § 636(b)(1) (Dkt. No. 28).

to lead to the discovery of admissible evidence; (b) not permitted under its administrative regulations; and (c) an encroachment upon the deliberative process privilege.

Under the Federal Rules of Civil Procedure, “Parties may obtain discovery regarding any matter, not privileged that is relevant to the claim or defense of any party....” FED. R. CIV. P. 26(b)(1). “Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Given the preference for liberal discovery under the rules, the burden is on the party seeking a Rule 26(c) protective order to establish good cause and to show the necessity of its issuance. *See In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998); *Federal Trade Comm’n v. U.S. Grant Resources, LLC*, 2004 WL 1444951, at \*7 (E.D. La. 2004). “Good cause” exists when justice requires the protection of “a party or person from annoyance, embarrassment, oppression, or undue burden or expense” FED. R. CIV. P. 26(c).

The EEOC first contends that it is entitled to a protective order because U-Haul’s planned deposition of Flores is not reasonably calculated to lead to the discovery of admissible evidence. The EEOC posits that Flores does not possess any facts relating to the underlying claims of discrimination asserted against U-Haul that are independent of the information already in the investigative files, which have been

provided to U-Haul, save purportedly privileged material. However, Rule 30(b)(6) does not require that a designated deponent have first-hand knowledge of the matters in controversy. *See SEC v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992); *see also Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (noting that the imposition of a requirement of personal knowledge for a Rule 30(b)(6) deponent would be at odds with the language and purpose of the rule). Rule 30(b)(6) requires only that designated persons testify to “matters known or reasonably available to the organization.” FED. R. CIV. P. 30(b)(6).

In a similar vein, the EEOC cites *Leyh v. Modicon, Inc.*, 881 F. Supp. 420, 424 (S.D. Ind. 1995), for the quote that “[t]estimony from [an EEOC investigator] about the results of his investigation would not, as a general rule, be admissible in a trial of the underlying facts.” Admissibility is also is not a standard for discovery under the Rules. Rule 26(b)(1) provides that “Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1).

And while it does not specifically cite Rule 26(b)(2),<sup>2</sup> the EEOC struggles in its motion to articulate the argument that the deposition of Flores would be

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<sup>2</sup> Rule 26(b)(2) authorizes the court to limit a deposition where “the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” FED. R. CIV. P. 26(b)(2)(i).

unreasonably cumulative because U-Haul already has the non-privileged contents of the investigatory file. However, the EEOC fails to demonstrate that the deposition of Flores would not lead to the discovery of additional evidence outside the investigative file (e.g., additional potential witnesses, exculpatory evidence, the factual basis for naming U-Haul International, Inc. as a defendant).

Thus, with these considerations cleared, all we are left with is the bare assertion that this deposition is not reasonably calculated to lead to the discovery of admissible evidence. This does not satisfy the requirements for a protective order. *See In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (conclusory statements do not show the necessity of a protective order).

In its reply, the EEOC further cites several cases that quash Rule 30(b)(6) depositions based on the work product doctrine: *SEC v. Buntrock*, 2004 WL 1470278, at \*3 (N.D. Ill. 2004); *EEOC v. HBE Corp.*, 157 F.R.D. 465, 466 (E.D. Mo. 1994); and *SEC v. Rosenfeld*, 1997 WL 576021, at \*2-\*3 (S.D.N.Y. 1997). The work product doctrine accords a qualified immunity to documents that are prepared in anticipation of litigation and/or that reflect conclusions, opinions, legal theories, or mental impressions of a party's attorney. *See* FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). The party asserting work-product protection has the burden of establishing the doctrine applies. *See Hodges, Grant & Kaufmann v. U.S.*

*Gov't*, 768 F.2d 719, 721 (5th Cir. 1985). Here, the EEOC has not asserted the doctrine, nor attempted to show that Flores's investigation is protected by it.

The EEOC next argues that a protective order is necessary because the EEOC's regulations published at 29 C.F.R. §§ 1610.30–.36 do not allow Flores to testify without approval of the EEOC's legal counsel. In particular, the EEOC cites section 1610.32, which provides:

No employee or former employee of the Commission shall, in response to a demand of a court or other authority, produce any material contained in the files of the Commission or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the prior approval of the Legal Counsel.

As authority that its own regulations justify the issuance of a protective order, the EEOC cites *James v. McGrath*, 1979 WL 77, at \*1 (N.D. Ohio 1979). This is a one paragraph order issued by a court a quarter of a century ago quashing a subpoena served on an EEOC employee containing discussion of neither facts nor law. The order merely states that the subpoena was precluded by 29 C.F.R. §§ 1610.30–.36, without answering the question why. *Id.* Thus, neither the EEOC's argument nor the legal authority cited by it are convincing. In effect, the EEOC is stating that Flores may not be deposed because she has not been given permission to be deposed ... by the EEOC.

Despite the EEOC's reliance on 29 C.F.R. § 1610.32, neither this administrative regulation, nor the federal "housekeeping" statute that authorizes its promulgation, 5 U.S.C. § 301, creates an independent privilege for federal agencies or their employees to withhold information. *See Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 777-80 (9th Cir. 1994). As the last sentence of the statute explains: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301. More to the point, it is the Federal Rules of Civil Procedure, and not federal agency administrative regulations, that govern discovery requests made against government agencies, whether or not the United States is a party to the underlying action. *Exxon Shipping Co.*, 34 F.3d at 780; *see also United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958) (the government as a litigant is subject to the rules of discovery); *Mitchell v. Bass*, 252 F.2d 513, 517 (8th Cir. 1958) (the Secretary of Labor, in a civil suit brought in his official capacity, is in no different a position than any ordinary litigant, and is therefore bound by the Federal Rules of Civil Procedure in the same respects as an ordinary litigant). Federal Rule of Civil Procedure 30(b)(6) provides that a deposition may be taken of "a public or private corporation or a partnership or association or *government agency....*" (emphasis added).

The Fifth Circuit dealt with this issue in *NLRB v. Capital Fish Co.*, 294 F.2d 868 (5th Cir. 1961). Relying on regulations similar to the EEOC's, the General Counsel of the National Labor Relations Board denied permission for a private company charged with labor law violations to subpoena and secure the testimony of the agency's investigating attorney. *Id.* at 870. The Fifth Circuit concluded these types of regulations furnish "housekeeping" authority to federal agencies to centralize the determinations of when and when not to assert a privilege; they do not bar judicial determination of the question of privilege or a demand for the production of evidence found not privileged. *Id.* at 875. In other words, 29 C.F.R. §§ 1610.30–.36 gives the EEOC a mechanism for determining when to assert a privilege; it does not create a substantive privilege when no privilege otherwise exists. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979) (explaining that 5 U.S.C. § 301 does not provide "substantive rules" regulating disclosure of government information; section 301 is simply a "housekeeping" statute). The Fifth Circuit concluded that the determination of whether a privilege exists is reserved to the courts, not to federal agencies through their regulations or their general counsel. *Capital Fish Co.*, 294 F.2d at 875. More recently, the court in *Carter v. Mississippi Dep't of Corr.*, 1996 WL 407241, at \*3 (N.D. Miss. 1996), also concluded that the federal housekeeping statute is insufficient

to grant executive agencies the authority to create a “privilege” from testimony for their employees.

Furthermore, as explained by the court in *Boron Oil Co. v. Downie*, 873 F.2d 67, 70 (4th Cir. 1989), “The policy behind such prohibitions [such as 29 C.F.R. § 1610.32] on the testimony of agency employees is to conserve governmental resources *where the United States is not a party to a suit....*” (emphasis added).

And lastly, the EEOC, in passing, invokes the “deliberative process” privilege in support of its motion.<sup>3</sup> This is insufficient. To be effective, the government must specifically claim this privilege. *See Mobil Oil Corp. v. Dep’t of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983) (the burden is on the government to properly invoke the deliberative process privilege); *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981) (same).

U-Haul objects on procedural grounds that the privilege has not been properly asserted, relying on such cases as *Scott Paper v. United States*, 943 F. Supp. 501, 502 (E.D. Pa. 1996) and *Walker v. NCNB Nat’l Bank of Florida*, 810 F. Supp. 11, 14

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<sup>3</sup> The “deliberative process” privilege shields from disclosure those documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. *See Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981). Purely factual information is not protected by the privilege. *Id.* at 882. The purpose of the privilege is to protect the decision-making process from the inhibiting effect that disclosure of predecisional advisory opinions and recommendations might have on the frank discussion of legal or policy matters in writing. *See Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38 (5th Cir. 1982). The privilege is narrowly construed by the courts and is strictly confined to the narrowest possible limits because its benefits are “at best indirect and speculative.” *EEOC v. Stauffer Chem. Co.*, 1990 WL 19967, at \*1 (N.D. Ill. 1990); *see also Federal Deposit Ins. Corp. v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998); *Mobil Oil Corp. v. Dep’t of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983); *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981).

(D.D.C. 1993), for the proposition that there must be a formal claim of privilege, lodged by the head of the department having control over the matter, after personal consideration by that officer. *Cf. United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (same). While there is a split of authority among the federal courts on how literally to apply the “head-of-agency” requirement, it is doubtful that the Fifth Circuit would actually require one of the Commissioners of the EEOC to personally invoke the deliberative process privilege.<sup>4</sup>

But even if the privilege may be effectively invoked by the director of the local EEOC district office, that requirement has not been satisfied here. In its motion, the EEOC merely states that “The Commission’s Houston District Office has contacted Legal Counsel’s office, and was not granted approval to produce Ms. Flores for deposition.” Dkt. No. 27, at ¶ 8. A half-hearted invocation of the privilege by trial

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<sup>4</sup> In *Branch v. Phillips Petroleum Co. v. EEOC*, 638 F.2d 873, 882-83 (5th Cir. 1981), the Fifth Circuit found the “head-of-agency” requirement satisfied where the director of the EEOC’s Houston district office, Harriet Joan Ehrlich, invoked the privilege by refusing to disclose subpoenaed materials after consulting with the EEOC General Counsel, and where the EEOC’s objections to the disclosure were made to the court in writing. The Fifth Circuit’s finding in *Branch* is in accord with other courts that have held the “head-of-agency” rule is not quite as literal as suggested by the Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), where the Court was dealing with the state secrets privilege, rather than the deliberative process privilege. *See, e.g., Landry v. Federal Deposit Ins. Corp.*, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (finding the head of the FDIC’s regional division in Memphis was of sufficient rank to assert the deliberative process privilege); *United States Dep’t of Energy v. Brett*, 659 F.2d 154, 155-56 (Temp. Emer. Ct. App. 1981) (holding that it was not necessary for head of the agency to assert the deliberative process privilege); *but see Marriot Int’l Resorts v. United States*, 61 Fed. Cl. 411, 417-19 (2004) (requiring the privilege be personally invoked by the Commissioner of the IRS, rather than allowing delegation of the authority to the Assistant Chief Counsel of the IRS; thus ensuring that the privilege is invoked only when absolutely necessary); *Scott Paper Co. v. United States*, 943 F. Supp. 501, 502-03 (E.D. Pa. 1996) (agency heads may not delegate authority to invoke the privilege); *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981) (proper procedure would have been for the Secretary of the Department of Energy to submit an affidavit invoking the privilege).

counsel for the EEOC is not good enough. *See Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981) (the affirmations of staff attorneys, especially those in pending litigation, are legally insufficient). The privilege must be specifically and personally asserted by a commissioner of the EEOC, or the local district director, after personal consideration of the matter.


Moreover, many courts have ruled that the deliberative process privilege is simply unavailable to the government when it is the plaintiff in a case. *See, e.g., EEOC v. Airborne Express*, 1999 WL 124380, at \*2 (E.D. Pa. 1999); *Federal Deposit Ins. Corp. v. Hatziyannis*, 180 F.R.D. 292, 293-94 (D. Md. 1998) (explaining that the privilege does not apply where the government is the plaintiff); *United States v. Ernstoff*, 183 F.R.D. 148, 153 (D.N.J. 1998) (denying the privilege to the Housing and Civil Enforcement Section of the Department of Justice, noting that the agency frequently plays the role of the plaintiff); *EEOC v. Citizens Bank & Trust Co. of Maryland*, 117 F.R.D. 366, 366 (D. Md. 1987) (asserting that when the government seeks affirmative relief as a plaintiff, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over); *Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 53 F.R.D. 260, 262 (W.D. Okla. 1971) (holding that plaintiff FDIC would be denied the privilege as to the reports of FDIC examiners because it instituted the action); *but see U.S. EEOC v.*

*Windsor Court Hotel*, 1999 WL 407610, at \*1 (E.D. La. 1999) (applying the privilege without discussion of the EEOC's role as plaintiff); *Allen v. Hearst Corp.*, 1991 WL 323020, at \*2 (D. Md. 1991) (expressing disagreement in dictum that the EEOC waives the deliberative process privilege by merely becoming a plaintiff in a lawsuit).

In any event, there is no reason to believe that the deliberative process privilege applies here based upon the arguments proffered in the EEOC's motion. Therefore, the EEOC has failed to show the necessity of quashing the deposition or why a protective order should be issued limiting it.

Accordingly, the EEOC's motion (Dkt. No. 27) is DENIED.

Signed on February 4, 2005, at Houston, Texas.

  
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Stephen Wm. Smith  
United States Magistrate Judge